

1 **BARBARA LAWALL**
2 **PIMA COUNTY ATTORNEY**
3 **CIVIL DIVISION**
4 Regina L. Nassen, SBN 014574
5 Andrew L. Flagg SBN 25889
6 Deputy County Attorneys
7 32 North Stone Avenue, Suite 2100
8 Tucson, Arizona 85701
9 Telephone: 520-724-5700
10 Regina.Nassen@pcao.pima.gov
11 Andrew.Flagg@pcao.pima.gov
12 *Attorneys for Defendants*

13 **ARIZONA SUPERIOR COURT**
14 **PIMA COUNTY**

15 Richard Rodgers, et al.,
16 Plaintiffs,
17 vs.
18 Charles H. Huckelberry, et al.,
19 Defendants.

Case No. C20161761

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

AND

**CROSS-MOTION FOR PARTIAL
SUMMARY JUDGMENT**

(The Honorable Catherine Woods)

20 Defendants (collectively, "the County") oppose Plaintiffs' (collectively,
21 "Rodgers") Motion for Partial Summary Judgment regarding Count 2, and cross-move
22 for summary judgment in the County's favor on that same count. While Rodgers
23 correctly asserts that there is no genuine dispute of material fact regarding Count 2, it is
24 the County—not Rodgers—that is entitled to judgment as a matter of law. Accordingly,
25 the County respectfully requests that this Court deny Rodgers's motion and grant the
26 County's cross-motion.

1 **Memorandum of Points and Authorities**

2 **A. Whether [A.R.S. § 11-256](#) applies when a county leases property for economic**
3 **development purposes is a purely legal issue on which summary judgment is**
4 **appropriate.**

5 While Rodgers’s Separate Statement of Facts describes the Lease-Purchase
6 Agreement in some detail, colored with legal conclusions, there really is only one
7 undisputed fact material to the legal issue raised in the motion: the County entered into a
8 Lease-Purchase Agreement with World View without following the procedures in A.R.S.
9 [§ 11-256](#) because, in the County’s view, leases for economic development under A.R.S. [§](#)
10 [11-254.04](#) need not comply with [§ 11-256](#). (PSOF¹ ¶¶ 9, 24; DSOF, ¶¶ 9, 24.) With that
11 material fact undisputed, Rodgers’s motion raises a pure question of law: does [§ 11-256](#)
12 apply to the County’s leasing of its facility to World View for economic-development
13 purposes? If it does, Rodgers should prevail on Count 2. But if, as the County contends, it
14 does not, then the County should prevail on Count 2.

15 **B. This Court should grant the County, and not Rodgers, summary judgment on**
16 **Count 2 because the requirements of [§ 11-256](#) do not apply to economic-**
17 **development leases authorized under [§ 11-254.04](#).²**

18 [Section 11-256](#) is a general statute, authorizing county boards of supervisors to

19 ¹“PSOF” refers to Rodgers’s Statement of Facts. “DSOF” refers to the County’s
20 Response to Rodgers’s Statement of Facts.

21 ²As Rodgers notes, this Court in denying the County’s motion to dismiss concluded that [§](#)
22 [11-256](#) does apply. But the Court’s denial of the County’s motion to dismiss was a
23 nonfinal ruling, which this Court may reconsider. *E.g.*, [Zimmerman v. Shakman](#), 204
24 Ariz. 231, 236, ¶ 15 (App. 2003); *see also* [State ex rel. Dep’t of Econ. Sec. v. Powers](#),
184 Ariz. 235, 236 (App. 1995) (denial of motion to dismiss not a final judgment).
25 Indeed, this Court expressly noted that its ruling was “without prejudice” and that the
26 Court was “open-minded to considering . . . additional or new authorities.” (DSOF ¶ 26.)
The County respectfully submits that the Court’s ruling in denying the motion to dismiss
was in error, and here reasserts its prior arguments and provides additional authorities in
support.

1 lease county property, without any restriction as to the purpose for the lease. It requires
2 the county to have the rental value of the property appraised, publish notice of the
3 proposed lease and its material terms, hold an auction, and lease the property to the
4 highest bidder for no less than 90% of the appraised value. [Section 11-254.04](#) separately
5 authorizes the County to “appropriate and spend public monies for and in connection
6 with economic development activities,” which are defined as any “activity . . . that the
7 board of supervisors has found and determined will assist in the creation or retention of
8 jobs or will otherwise improve or enhance the economic welfare of the inhabitants of the
9 county,” including *specifically* the “acquisition, improvement, leasing or conveyance of
10 real or personal property.” [§ 11-254.04](#). The question is whether a county, when it
11 exercises its explicit authority under [§ 11-254.04](#) to lease county-owned property in order
12 to enhance the economic welfare of the community, must follow [§ 11-256](#)’s appraise-
13 and-auction process.

14 Although courts can employ various principles in interpreting statutes, they all
15 serve one end—“ascertain[ing] the meaning of the statute and intent of the legislature.”
16 [City of Phx. v. Superior Ct.](#), 139 Ariz. 175, 178 (1984). Among the tools courts use are
17 the *pari materia* rule and examination of legislative history (which Rodgers cites), *see*
18 [State v. Bowsher](#), 225 Ariz. 586, 588-89, ¶ 13 (2010); [Collins v. Stockwell](#), 137 Ariz. 416,
19 419 (1983), but also avoiding constructions that render language meaningless and
20 specific statutes controlling over general statutes (which Rodgers does not cite), *see* [State](#)
21 [v. Eddington](#), 228 Ariz. 361, 363, ¶ 9 (2011); [Mercy Healthcare Ariz., Inc. v. Ariz. Health](#)
22 [Care Cost Containment Sys.](#), 181 Ariz. 95, 100 (App. 1994). All of these tools are means
23 and not ends—ultimately, the goal is to “give [statutes] a fair and sensible reading.” [City](#)
24 [of Phx.](#), 139 Ariz. at 178. Reading [§ 11-254.04](#) to authorize counties to enter into leases
25 of county-owned property for economic-development purposes only after following the
26 appraise-and-auction process in [§ 11-256](#) is not a fair reading of that statute, and

1 obstructs its obvious purpose.

2 **1. The Legislature’s failure to include an explicit [§ 11-256](#) exemption in [§ 11-](#)**
3 **[254.04](#) does not conclusively indicate that compliance with that statute is**
4 **required.**

5 Rodgers states that “[e]ach of the four times that the Legislature has sought to
6 exclude county leases from section [§ 11-256](#), it has done so *explicitly*, through a ...
7 ‘notwithstanding’ clause,” and based on that argues that no exemption was intended for
8 leases authorized by [§ 11-254.04](#). (Rodgers’s Mot. for Partial Summ. J. (“MSJ”), at 4.)
9 That argument, however, assumes its own conclusion: that those were the only four times
10 the Legislature created a [§ 11-256](#) exception. In fact, that is exactly the question about
11 which we are arguing. All we can say is that the Legislature has included several explicit
12 [§ 11-256](#) exemptions in later-enacted, more specific statutes regarding county leasing
13 authority. It does not necessarily follow that that the Legislature did not create an
14 exemption when it enacted [§ 11-254.04](#) without including an explicit reference to [§ 11-](#)
15 [256](#). Rodgers’s reasoning is that “if A, then B; not A; therefore not B.” But that is a
16 deductively invalid argument; it suffers from the formal fallacy of denying the
17 antecedent. “Not B” does not in fact follow necessarily from the premises.

18 And the Arizona Supreme Court has recognized that that the absence of an explicit
19 cross-reference to another statute is not determinative. In [Bowsher](#), the Court was faced
20 with one statute that requires a probationary period to begin “without delay,” and another
21 that states “[a] period of probation commences on the day it is imposed or as designated
22 by the court.” 225 Ariz. at 587, ¶ 7, 588, ¶ 12. The question was whether the first statute
23 prohibits consecutive probationary periods. [Id.](#) at 588, ¶ 12. The Court held that it does
24 not; it concluded that the phrase “or as designated by the court” in the second statute
25 makes the imposition of consecutive probation terms permissible, and that the first statute
26 simply requires each subsequent period to begin immediately upon completion of the
prior one. [Id.](#) at 589 n.4. It noted that this construction is not barred by the fact that the

1 Legislature has “specifically directed or barred consecutive sentences in other
2 circumstances.” *Id.* at 588 n.2.

3 And the Court of Appeals has concluded the same thing, specifically as to [§ 11-](#)
4 [256](#). Despite the absence of an explicit exemption from [§ 11-256](#)’s public auction
5 requirement in [A.R.S. § 11-932](#), and despite the fact that the public-park operating
6 agreement at issue in that case, which was entered into under [§ 11-932](#), was functionally
7 a lease, the court concluded that “the *public auction requirement* of [§ 11-256\(C\)](#) is
8 inapplicable.” [Johnson v. Mohave Cty.](#), 206 Ariz. 330, 333, ¶ 11 (App. 2003) (emphasis
9 added). [Section 11-932](#) explicitly exempts leases and other agreements for the operation
10 of public parks only from [§ 11-256](#)’s “10-year limitation” (a limitation that is no longer
11 even in [§ 11-256](#)), but not from the appraise-and-auction process.

12 As for why the Legislature did not include an explicit [§ 11-256](#) exemption when it
13 enacted [§ 11-254.04](#), it is worth noting that, as a drafting matter, including such an
14 explicit exemption would have been awkward given the breadth of economic
15 development activities authorized by [§ 11-254.04](#), of which leasing is just one. The
16 statutes that do contain an explicit exemption to [§ 11-256](#) all more exclusively concern
17 real-property leasing and conveyance, rather than a separate authority that can be
18 exercised *by* leasing or conveying real-property. [Section 11-1435](#) concerns operating
19 agreements for county-owned health-care facilities (which under [§ 11-1432](#) include a
20 leasing component). [Section 11-256.01](#) concerns leases of county-owned real property to
21 government entities, county fair associations or nonprofit corporations. [Section 11-251.10](#)
22 concerns leasing or conveyance of county-owned real property for affordable housing
23 purposes.

1 **2. Requiring compliance with [§ 11-256](#) for economic-development leases does**
2 **not “harmonize” the statutes; rather, it renders [§ 11-254.04](#)’s explicit**
3 **reference to leasing meaningless.**

4 Rodgers is correct that “[w]hen construing two statutes, [courts] will read them in
5 such a way as to harmonize and give effect to all of the provisions involved.” *Bowsher*,
6 225 Ariz. at 589, ¶ 14. But Rodgers’s interpretation of [§§ 11-256](#) and [11-254.04](#) does not
7 “harmonize” and “give effect” to both statutes; instead, it simply renders [§ 11-254.04](#)’s
8 reference to leases and conveyances meaningless. This runs afoul of the surplusage
9 canon: “If possible, every word and every provision is to be given effect None should
10 be ignored. None should needlessly be given an interpretation that causes it to duplicate
11 another provision or to have no consequence.” Antonin Scalia & Bryan A. Garner,
12 *Reading Law: the Interpretation of Legal Texts*, 174 (2012). This canon avoids an
13 interpretation that renders a provision “pointless.” *Id.* at 176. “[C]ourts avoid a reading
14 that renders some words altogether redundant. If a provision is susceptible of (1) a
15 meaning that *gives it an effect already achieved by another provision* ..., and (2) another
16 meaning that leaves both provisions with some independent operation, the latter should
17 be preferred.” *Id.* (emphasis added).

18 The predecessor to [§ 11-256](#) was enacted by the Arizona Legislature in 1939.
19 *Johnson*, 206 Ariz. at 333, ¶ 12. It was therefore already in place when the Legislature
20 added [§ 11-254.04](#) in 1994. 1994 Ariz. Sess. Laws, ch. 280, § 3. A board of supervisors
21 can enter into a lease under [§ 11-256](#) for *any* reason or purpose by utilizing that statute’s
22 appraise-and-auction process. [Section 11-254.04](#)’s specific reference to leasing property
23 would be superfluous if it did no more than authorize counties to engage in activities
24 already permitted by the existing statute. A more natural reading of the two statutes is
25 that [§ 11-254.04](#) creates an exception to [§ 11-256](#), the more general statute, for a specific
26 class of leases: those entered into for economic-development purposes. Such a reading
limits [§ 11-256](#)’s scope, but by no means renders it meaningless. “[T]he two provisions

1 are not in conflict, but can exist in harmony.” Scalia & Garner, *supra*, at 185.

2 **3. Requiring compliance with [§ 11-256](#) for economic-development leases**
3 **obstructs the obvious purpose of [§ 11-254.04](#).**

4 The idea that [§ 11-254.04](#) creates an exception to [§ 11-256](#) also makes sense when
5 the statute is read as a whole and its purpose is considered. The statute gives boards of
6 supervisors authority to “appropriate and spend public monies for and in connection with
7 economic development activities.” While the focus of [§ 11-256](#) is on getting the highest
8 rent for leasing surplus county property, the authority under [§ 11-254.04](#) is to spend, not
9 to generate, public revenue. And the definition of “economic development activities”
10 explicitly includes “assistance” as well as projects, programs and studies. The statute
11 therefore clearly contemplates providing assistance to private companies—consistent
12 with constitutional restrictions—in order to achieve greater economic benefits for the
13 community as a whole.

14 Providing that authority, and explicitly stating that leasing real property is one of
15 the available means for exercising it, but then requiring leases to be awarded based on the
16 amount of rent alone, simply makes no sense. Common sense tells us that a lease being
17 done to achieve a specific economic objective *must* be done on some basis other than the
18 rental rate. The County, for example, has an economic-development plan that includes
19 attracting high-tech aviation and aerospace companies to relocate to or expend on the real
20 property the County has designed as the Aerospace, Defense and Technology Business
21 and Research Park.³ It hopes that the presence of each company will, in turn, help attract
22 other companies to the area, building a synergy and an economic momentum that will
23

24 _____
25 ³See Pima County’s Economic Development Plan, 2015-2017,
26 [http://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/Economic%20Dev
elopment/Econ%20Dev%20Plan%202015/Economic%20Development%20Plan%202015
%20Download%20version.pdf](http://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/Economic%20Development/Econ%20Dev%20Plan%202015/Economic%20Development%20Plan%202015%20Download%20version.pdf)

1 eventually be self-sustaining. At the same time, the County needs to ensure that any new
2 companies operate in a manner that is compatible with the security needs of Raytheon,
3 which is located on neighboring land (*see* Answer Exhibit E, Huckelberry January 19,
4 2016 Memo, at 4). Simply letting property to the highest bidder, regardless of the type of
5 company or its economic impact on the community, will not work. So while Rodgers’s
6 interpretation of the statutes ignores and obstructs [§ 11-254.04](#)’s obvious purpose, the
7 County’s interpretation furthers that purpose. “A textually permissible interpretation that
8 furthers rather than obstructs the [statute’s] purpose should be favored.” Garner & Scalia,
9 *supra*, at 63.

10 Rodgers points to an old request for proposals that the County did for a race track
11 as an indication that complying with [§ 11-256](#) is “perfectly compatible with economic
12 development leases.” (MSJ, at 5.) In fact, however, although the process conducted in
13 that instance sought to be competitive, there was no actual bid conducted; the RFP to
14 which Rodgers cites makes it clear that the lease would not be awarded based on the rent.
15 Instead, the County set the rent in advance, and then intended to award the lease based on
16 other, nonmonetary factors, rather than to the “highest bidder.” *See* RFP, at 2, 10-11.

17 Rodgers points out that one of the purposes of [§ 11-256](#)’s appraise-and-auction
18 process is to “prevent favoritism, fraud and public waste.” That may be, but [§ 11-254.04](#)
19 does not eviscerate the older and more general statute; it simply creates an exception to it.
20 And there are other mechanisms in place that also help prevent favoritism, fraud and
21 public waste, including the Gift Clause ([Ariz. Const. art. 9, § 7](#)); prohibitions on conflicts
22 of interest (A.R.S. [§§ 38-444](#) and [38-501 through 38-511](#)); and open meeting laws
23 (A.R.S. [§§ 38-431 through 38-431.09](#)).

24 **C. Conclusion**

25 The Court here is faced with two competing statutory interpretations. Rodgers’s
26 interpretation emphasizes the absence of an explicit exemption in [§ 11-254.04](#) at the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

expense of rendering [§ 11-254.04](#)'s reference to leasing meaningless. The County acknowledges that the legislature *could* have (albeit awkwardly) included an explicit [§ 11-256](#) exemption in [§ 11-254.04](#), but its failure to do so is not determinative. The County's interpretation gives meaning to [§ 11-254.04](#)'s reference to leasing, and furthers its obvious purpose, without rendering [§ 11-256](#) meaningless. Because it is the County's interpretation that gives the statute "a fair and sensible reading," *City of Phx.*, 139 Ariz. at 178, the County's interpretation is correct. Accordingly, the County respectfully requests that this Court deny Rodgers's Motion for Partial Summary Judgment and grant the County's Motion for Summary Judgment on Count 2 of Rodgers's Complaint.

RESPECTFULLY SUBMITTED November 21, 2016.

BARBARA LAWALL
PIMA COUNTY ATTORNEY
By: /s/ Regina L. Nassen
Regina L. Nassen
Andrew L. Flagg
Deputy County Attorneys

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2016, I electronically transmitted the attached document to the Clerk’s Office using the TurboCourt System for filing and transmittal of a Notice of Electronic Filing to the following TurboCourt registrants:

Honorable Judge Catherine Woods
Judge of Superior Court
110 W. Congress
Tucson, AZ 85701
Assigned Judge

James Manley, Esq
Veronica Thorson, Esq.
Goldwater Institute
500 E. Coronado Rd.
Phoenix, AZ 85004
Attorneys for Plaintiffs

By: S. Bowman